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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

SAYCO LTD.,

Petitioner,

vs.

John H. Dalton,
SECRETARY OF THE NAVY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented for Review.

Should not the decision of the United States Court of Appeals for the Federal Circuit in *Sayco Ltd. v. John H. Dalton, Secretary of the Navy*, ___F.3d ___ (April 3, 1996), be set aright for flouting *stare decisis* doctrine in a case representative of every case on appeal from a decision by a contracting officer under the Contract Disputes Act of 1978, 41 U.S.C. § 601 et seq. and where such decision

1) summarily refuses to order the Armed Services Board of Contract Appeals ("ASBCA") to review the decision of a contracting officer *de novo* in the face of a long-standing body of judicial law to the contrary, culminating most recently in an in banc decision by that very circuit, and where the court

2) does so by simply characterizing arguments basically and essentially governed by such precedents as "without merit"

3) with no explanation for such disregard of precedent, nor for such asserted lack of merit; with not even any reference whatever to the decisional precedent - nor even a denomination of it; and where the court

4) violates its own rule that only a decision that does not add significantly to the body of the law shall bear a legend that it is not to be cited as precedent; and

5) summarily disregards important public policy firmly established by Congress by baldly characterizing arguments basically and essentially governed by such public policy as "without merit", with no explanation for such conclusion nor for such asserted lack of merit, and with not even any reference to or discussion of that public policy; and where the court

6) does all of the foregoing covertly.

Parties to the Proceeding Below.

The parties to the proceeding below were petitioner, Sayco Ltd. (a wholly-owned subsidiary of Herley Industries, Inc.) ("Sayco") and John H. Dalton, Secretary of the Navy.

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Reports of Opinions and Orders Below.

Appeal of Sayco Ltd., 92-1 BCA ¶ 24,573 (November 8, 1991) (decision by ASBCA denying cross-motions for summary judgment).

Appeal of Sayco Ltd., 94-3 BCA ¶ 27,284 (November 7, 1994) (final decision by ASBCA granting in part and denying in part Sayco's claims).

Sayco Ltd. v. John H. Dalton, Secretary of the Navy, __ F.3d ___, 40 CCF ¶76,919 (Fed. Cir., April 3, 1996) (decision and judgment of the court below).

Sayco Ltd. v. John H. Dalton, Secretary of the Navy, ___F.3d ___, 40 CCF ¶ ___ (Fed. Cir., May 8, 1996) (order denying Sayco's petition for rehearing and suggestion that it be heard in banc).

Jurisdictional Statement.

The judgment sought to be reviewed was entered on April 3, 1996.

An order denying rehearing of that judgment was entered on May 8, 1996.

The statute conferring jurisdiction on this Court to review the judgment on a writ of certiorari is 28 U.S.C. § 1254(1).

Statute Involved.

The statute involved in this case is the Contract Disputes Act of 1978, 41 U.S.C. § 605, providing, in pertinent part, as follows:

> **§ 605. Decision by contracting officer**
>
> **(a) Contractor claims**
>
> * * * *
>
> Specific findings of fact are not required, but, if made, shall not be binding in any subsequent proceeding.. . .
>
> * * * *
>
> **(b) Review; performance of contract pending appeal**
>
> The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government

agency, unless an appeal or suit is timely commenced as authorized by this chapter.. . .

Statement of the Case and Basis for Federal Jurisdiction.

The basis for federal jurisdiction in the court of first instance, i.e., the United States Court of Appeals for the Federal Circuit, was the Contract Disputes Act of 1978, 41 U.S.C. §§ 601 et seq.; most specifically § 607(g)(1)(A).

Reasons Relied on for Allowance of the Writ.

The United States Court of Appeals for the Federal Circuit has, in this instance, sanctioned such a departure by ASBCA from controlling and most important law (*stare decisis* as to the scope of appellate review of contracting officers' decisions) as to call for an exercise of this Court's supervisory power, and the Court of Appeals' refusal to order ASBCA to review a contracting officer's decision *de novo* as required by *stare decisis* is in conflict with relevant decisions of this Court.

Background.

Petitioner Sayco, as a supplier of certain materials to the Navy, became entitled to supplemental payments under Value Engineering Changes ("VEC") regulations (Defense Acquisition Regulations 7-104.44 et seq.). The contracting officer rejected many of Sayco's claims for VEC payments. Appendix ("A") A-46 - A-52. Notably, he did so not for their amounts as such, but rather upon erroneous determinations of fact, or even of substantive law. Idem. Accordingly, Sayco petitioned ASBCA to review the contracting officer's decision *de novo.* A-53. ASBCA refused to do that, holding that it could review the contracting officer's decision only for arbitrariness and capriciousness. A-18 - A-19; A-35 - A-37. Sayco then petitioned the court below to order ASBCA to review the contracting officer's decision *de novo.* A-54 - A-55.

That court did not even mention Sayco's argument in its decision, or the firmly established chain of authorities

supporting it - *capped by the court's own in banc decision in Wilner v. The United States*, 24 F.3d 1397 (Fed. Cir. 1994).

> The plain language of the CDA and our decision in *Assurance* [*Co. v. United States*, 813 F.2d 1202 (Fed. Cir. 1987)] make it clear that when suit is brought following a contracting officer's decision, the findings of fact in that decision are not binding upon the parties and are not entitled to any deference.
>
> *Wilner*, 24 F.3d at 1401.

Instead, the court below apparently summarily disposed of this critical issue *sub silentio* under a conclusory catchall characterization , "without merit". A-3.

The *Stare Decisis* Imperative.

Perhaps no doctrine short of constitutional level is as demanding as *stare decisis*.

> Time and time again, this Court has recognized that "the doctrine of stare decisis is of fundamental importance to the rule of law." [Citations.] Adherence to precedent promotes stability, predictability, and respect for judicial authority. Vasquez v. Hillery, 474 U.S. 254, 265-266 (1986). For all of these reasons, we will not depart from the doctrine of stare decisis without some compelling justification. [Citation.]
>
> *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197, 202 (1991).

> Stare Decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.
>
> *Burnet v. Coronado Oil and Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). Cited with approval in *Hilton*,

supra and *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

The *stare decisis* status of *de novo* review by ASBCA (supra) stands beyond argument.

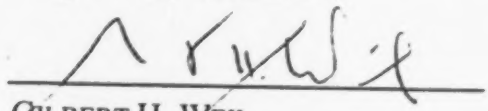
If, possibly, there might be some reason for the court below to have turned its back upon the doctrine it has not offered any explanation for doing so. No reason. Not even a mere declaration of a reason; much less a reasoned reason, or a "better" reason. Much less "some compelling justification". *Hilton*, supra.

"[S]tability, predictability, and respect for judicial authority" are all forsaken if a United States Court of Appeals is to be left free under a blanket of silence and unaccountability to act in square contravention of firmly rooted *stare decisis*.

Hence, petitioner now seeks this Court's exercise of its supervisory power to set straight the lower court's decision, which stands in sharp conflict with relevant decisions of this Court.

Dated: New York, New York
July 15, 1996

Respectfully submitted,



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APPENDIX

TABLE OF CONTENTS

	Page
Sayco Ltd. v. John H. Dalton, Secretary of the Navy, __ F.3d ____, 40 CCF ¶ 76,919 (Fed. Cir., April 3, 1996) (decision and judgment of the court below). ...	A-1
Appeal of Sayco Ltd., 94-3 BCA ¶ 27,284 (November 7, 1994) (final decision by ASBCA granting in part and denying in part Sayco's claims).	A-7
Appeal of Sayco Ltd., 92-1 BCA ¶ 24,573 (November 8, 1991) (decision by ASBCA denying cross-motions for summary judgment).	A-25
Sayco Ltd v. John H. Dalton, Secretary of the Navy, ___F.3d ___, 40 CCF ¶ ___ (Fed. Cir., May 8, 1996) (order denying Sayco's petition for rehearing and suggestion that it be heard in banc).	A-44
Final Decision of Thomas J. Fura, Contracting Officer, pages 13-19, dated May 8, 1990	A-46
Sayco's Post-Hearing Submissions, page 17, before ASBCA, dated February 14, 1994.	A-53
Brief of Appellant Sayco, pages 15-17, in the United States Court of Appeals for the Federal Circuit, dated May 5, 1995.	A-54

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

95-1226

SAYCO LTD.,

Appellant,

v.

John H. Dalton,
SECRETARY OF THE NAVY,

Appellee.

DECIDED: April 3, 1996

Before CLEVENGER, RADER, and SCHALL, *Circuit Judges.*

SCHALL, *Circuit Judge.*

DECISION

Sayco, Ltd. ("Sayco") appeals the decision of the Armed Services Board of Contract Appeals ("Board") awarding it $151,747.19 as its share of the total cost savings under two separate contracts between Sayco and the Department of the Navy for submarine connector plugs. *Appeal of Sayco, Ltd.*, ASBCA No. 39366, 94-3 BCA (CCH) ¶ 27,284 (Nov. 7, 1994) ("*Sayco II*"). The Board awarded Sayco $131,109.58 under Contract Number N00104-84-C-1565 and $20,637.61 under Contract No. N00104-84-C-1504. We *affirm.*

DISCUSSION

I.

Sayco's two contracts incorporated by reference the Value Engineering clause set forth in what then was Defense Acquisition Regulation 7-104.44 (Oct. 1982). *Sayco II,* 94-3 BCA at 135,921. Under this clause, Sayco was entitled to share with the Navy any cost savings resulting from a value engineering change proposal ("VECP") which it submitted under the contracts and which was accepted by the Navy. *See Sayco, Ltd.,* ASBCA No. 39366, 92-1 BCA (CCH) ¶ 24,573 at 122,586 (November 8, 1991) ("*Sayco I*").[1] The clause recognized both "instant contract savings" (savings under the contracts) and "collateral savings" (savings in agency costs relating to operation of, and maintenance and logistic support for, goods furnished under the contracts). *Id.* Under the clause, Sayco was to be compensated for such savings by receiving additional compensation under the contracts. *Id.*

The VECP which Sayco submitted and was accepted increased the cost to the Navy of each connector plug delivered under the contracts. Consequently, the parties were confronted with what the Navy's contract administrator called "negative acquisition savings." At the same time, however, Sayco's VECP did result in collateral savings to the Navy. In due course, Sayco appealed to the Board under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-13, the Navy's determination as to the additional compensation to which Sayco was entitled under the contracts resulting from the combination of negative acquisition savings and collateral savings. Before the Board, Sayco argued that, for purposes of computing the contractor's share of collateral savings under each of the contracts, the "firm fixed price" referred to in the Value Engineering clause included the contractor's share of

---

[1] The findings the Board made in *Sayco I* were incorporated by reference into the Board's opinion in *Sayco II. Sayco II,* 94-3 BCA at 135,921. Because both *Sayco I* and *Sayco II* present the same issues, we cite to the Board's findings and conclusions in *Sayco I* where necessary.

collateral savings. Sayco also argued that the sharing period for collateral savings should be three years, and that evidence of what the parties meant by the offset provision contained in Modification A00003 to each of the contracts was barred by the parol evidence rule. *Sayco II,* 94-3 BCA at 135,926.

The Board determined (1) that the contract price's "firm fixed price" did not include collateral savings; (2) that the sharing period for collateral savings was only one year; and (3) relying upon parol evidence, that the parties had agreed that negative acquisition savings would be offset against collateral savings. *Id.* at 135,926-27. Having rejected Sayco's claims, the Board held that Sayco was entitled to the award noted above.

II.

We treat the decision of an agency board on any question of fact as final and conclusive unless the decision is "fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence." 41 U.S.C. § 609(b) (1994). We review the decision of an agency board on any question of law *de novo. Fruin-Colnon Corp. v. United States,* 912 F.2d 1426 (Fed. Cir. 1990). We address here three of the arguments raised by Sayco on appeal.[2]

First, Sayco argues that the Board erred in its interpretation of the collateral savings provisions contained in the Value Engineering clause. The Board concluded that the "firm fixed price" for purposes of the collateral savings paragraph of the Value Engineering clause was the contract price at the time a VECP was accepted and, therefore, did not include any increases or decreases in that price because of collateral savings. *Sayco II,* 94-3 BCA at 135,926. We agree.

---

[2] We have considered Sayco's other contentions and have found them all to be without merit.

The Value Engineering clause provided that the contractor's share of collateral savings "shall not exceed (i) the contract's firm fixed price . . . at the time the VECP is accepted, or (ii) $100,000, whichever is greater." *Id.* Sayco urges us to interpret the clause to mean that the "firm fixed price" included collateral savings. In rejecting this argument the Board observed that "[t]he clause says 'at the time the VECP is accepted' not 'after the VECP is accepted.'" *Sayco I,* 92-1 BCA at 122,590. The Board further observed that to accept Sayco's interpretation would "effectively read limitation (i) . . . out of the Value Engineering clause." *Id.* The reason is that adding the anticipated collateral savings to the existing contract price means that "the total will always be greater than the collateral savings since . . . [collateral savings] is one of the amounts making up the total." *Id.* We see no error in this analysis.

We also agree with the Board that the sharing period for collateral savings was only one year. Paragraph (g) of the Value Engineering clause stated that "the instant contract amount shall be increased . . . by 20 percent of the projected net reduction in collateral costs determined to be realized in a typical year of use. . . ." It is quite clear that the contract calls for a sharing period for collateral savings of one year, not three years.

Finally, the Board correctly determined that the parties agreed that negative acquisition savings would be offset against collateral savings. Sayco urges us to hold that the Board erred by relying upon parol evidence to determine the parties' intent. We find that the Board's reliance on parol evidence was proper. Parol evidence is admissible if the terms of a contract are ambiguous. *Beta Sys., Inc. v. United States,* 838 F.2d 1179, 1183 (Fed. Cir. 1988). In the present case, the contract, as modified, provided the negative acquisition savings would be offset in accordance with FAR 52.248-1(J) [sic: (j)]. FAR 52.248-1(j) limits that increase in the price of a contract after acceptance of a VECP to "20 percent of any projected collateral savings determined to be realized in a typical year of use after subtracting any Government costs not previously offset." FAR 52.248-1(j). To the extent that the

contract is ambiguous as to what government costs the parties intended to offset against collateral savings, we do not find erroneous the Board's resort to parol evidence to determine that it was the intent of the parties regarding this provision to offset negative acquisition savings against collateral savings.

For the foregoing reasons, we hold that the decision of the Board is supported by substantial evidence and is free of legal error. Accordingly, it is affirmed.

Each party shall bear its own costs.

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

95-1226

SAYCO LTD.,

Appellant,

v.

John H. Dalton,
SECRETARY OF THE NAVY,

Appellee.

Judgment

ON APPEAL from the ARMED SERVICES BOARD OF CONTRACT APPEALS

in CASE NO(S). 39366

This CAUSE having been heard and considered it is

ORDERED and ADJUDGED: AFFIRMED

ENTERED BY ORDER OF THE COURT

/s/ Francis X. Gindhart

Francis X. Gindhart, Clerk

DATED: APR 03 1996

ISSUED AS A MANDATE: May 28, 1996

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Sayco Ltd.	)	ASBCA No. 39366
	)	
Under Contract Nos. N00104-84-C-1565 and N00104-84-C-1504	)	

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OPINION BY ADMINISTRATIVE JUDGE BURG

This appeal concerns what amount, if any, appellant should receive from the Government for an approved Value Engineering Change Proposal (VECP). The parties' Cross-Motions for Summary Judgment were considered in a non-dispositive opinion, 92-1 BCA ¶ 24,573. We affirmed our conclusions in that opinion on appellant's motion for reconsideration of our denial of its motion for summary judgment, 92-3 BCA ¶ 25,124. Appellant filed an appeal with the Court of Appeals for the Federal Circuit which was docketed as *Sayco Ltd. v. Navy*, No. 92-1219, on 10 March 1992 and dismissed on motion of the appellee, 12 June 1992. Thereafter, there was an oral hearing at which time the parties presented evidence on the material facts which the Board had concluded were in dispute.

FINDINGS OF FACT

1. In our opinion on the cross-motions for summary judgment, we made detailed findings regarding the matters here in dispute. They are incorporated herein by reference and will be repeated only to the extent necessary in this opinion.

2. At some point after submittal of the VECP, appellant began to manufacture the connector plugs as proposed by its VECP. Since they did not comply with the then existing contract requirements, the Government inspector at appellant's plant would not accept the plugs and sign the Form DD-250s. Appellant could not be paid until the Form DD-250s were executed.

3. Appellant was anxious to obtain acceptance and execution of the DD-250s so it could be paid. Several meetings occurred between appellant's president, its attorney and Government personnel. As we found in our opinion on the cross-motions for summary judgment:

> Modification A00003 to Contract 1504 dated 28 October 1987 and Modification A00003 to Contract 1565 dated 9 November 1987 incorporated the VECP into each contract. These bilateral modifications provided (1) that Contract 1565 [Contract No. N00104-84-C-1565] was the "instant contract" and Contract 1504 [Contract N00104-84-C-1504] was the "concurrent contract", (2) that approval of VECP 001 resulted in "Negative Acquisition Savings" for Contract 1565 of $387,639 and for Contract 1504 of $154,225 (a total of $541,864), (3) that the definitized negative acquisition savings would be offset in accordance with FAR 52.248.1, para (J) [sic], (4) that collateral savings would be calculated and determined by the procuring contracting officer (PCO) and incorporated by contract modifications at a later date, and (5) that the contract price for Contract 1565 became $636,999 and for Contract 1504 became $254,405.

(92-1 BCA at 122,585-86) Modification A00003 for Contract 1565 is set forth in our prior opinion (92-1 BCA at 122,587) and will not be repeated here.

4. The Value Engineering (VE) clause, DAR 7-104.44 (1982 OCT), incorporated by reference into appellant's contracts did not define "Negative Acquisition Savings". The applicable provisions of the clause are set forth in our prior opinion (92-1 BCA at 122,586-87). Prior to issuance of Modification A00003 for each of these contracts, the contract administrator who prepared both modifications carefully considered the requirements of the clause. This was a unique situation since the VECP resulted in an increase rather than a decrease in the cost of each unit. The unit cost prior to acceptance of the VECP, $29.00, was increased to $101.00 per unit after acceptance. Certain tasks were performed by the contractor at its plant rather than on the ship.

5. The contract administrator did not consider the increased manufacturing costs were covered by the definition of "negative instant contract savings" which were described as the "excess of contractor's development and implementation costs as compared to the unit cost reduction". Negative instant contract savings result in an equitable adjustment increasing the instant contract price and are not considered a Government cost. (DAR 7-104.44(b)(7))

6. While "net acquisition savings" were defined as "acquisition savings" less Government costs, there was no provision in the clause when the "net acquisition savings" were negative rather than positive. The Government contract administrator concluded that the increased acquisition costs did not comply with the definition of "Government costs" in the VE clause which defined such costs as:

> (5) "Government costs" means those agency costs that result directly from developing and implementing the VECP and any net increase in the cost of testing, operations, maintenance, and logistics support. They do not include the normal administrative costs of processing the VECP.

(DAR 7-104.44(b)(5)) Therefore, after consultation with Government personnel and officials involved in the Value Engineering program and its implementation, he used the phrase "negative acquisition savings" as distinguished from "negative instant contract savings." In preparing bilateral Modification A00003 for Contract 1565 dated 9 November 1987, the language was carefully prepared by the contract administrator and reviewed by his superiors. It provided, in pertinent part:

1. *ACQUISITION SAVINGS*: The approval of VECP-001, 12 Nov 85, has resulted in "Negative" Acquisition Savings. Specifically, the VECP-001 results in a unit and total contract price increase on this, the instant contract [Contract 1565]; the aforementioned concurrent contract [Contract 1504] and on future contracts for the procurement of the applicable NSN(s). Accordingly, negative acquisition savings in the amount established below, will be offset in accordance with FAR 52.248-1, para (J) [sic]

NEGATIVE ACQUISITION SAVINGS	- $379,728.00 Recurring
	7,911.00 Non-recurring
Total	$387,639.00

2. *COLLATERAL SAVINGS*: Collateral savings will be calculated and determined by the NSPCC, PCO. The amount to be shared with and paid to the contractor shall be approved and incorporated into the contract at a later time via contract modification to be issued by the NSPCC, PCO.

3. *INCREASE IN UNIT PRICE/CONTRACT PRICE*

   a. Based on contract modifications A00001, 04 Sep 85 and A00002, 15 Aug 86;

wherein the contractor paid consideration in return for delivery schedule changes, the total contract amount was reduced FROM: $250,260 TO: $249,360.00. Accordingly, the unit price at the time of negotiation of this VECP-001 was established at $29.00 per unit as follows: ($249,360.00 divided by 8600 Ea. units = $28.995 or $29.00)

b. The following changes are hereby made to the unit price/contract amount for the remaining 5,274 Ea. units.

RECURRING COSTS:

Unit price for 5,274, Ea. items is increased by $72.00
FROM: $29.00 *TO:* $101.00

NON-RECURRING COSTS: Non-recurring development costs of $1.50 per unit for 5,274 Ea. units, or total development costs of $7,911.00 are hereby added to the contract.

TOTAL CONTRACT AMOUNT is increased as follows:

Established total amount:	$249,360.00
Additional recurring costs:	379,728.00
Addition[al] Non-recurring costs:	7,911.00
New Total Contract Amount:	$636,999.00

(R4, tab 1) A more complete version of Modification A00003 is set forth at 92-1 BCA at 122,587.

7. Bilateral Modification A00003 to Contract 1504 dated 28 October 1987 was similar to the one set forth above. It recited that the Negative Acquisition Savings for Contract 1504 were $151,240 for recurring and $2,985 for non-recurring costs, a total of $154,225. The unit price at the time of negotiation was $50.00 and was increased by $76.00 per unit to a unit price of $126 per unit. The total contract price at

the time of negotiation of the VECP was established to be $100,180 and was increased to $254,405.00. (R4, tab 2)

8. The contract administrator testified that during negotiations for determination of the amount appellant was to receive for acceptance of the VECP the matter was discussed with appellant and its counsel and that he made it quite clear that the negative acquisition savings would be offset against any amount determined for collateral savings. He did not consider this a deviation from the VE clause which required advance permission because it was outside the provisions of the clause itself. The matter was discussed on more than one occasion with Mr. Eli Natan, appellant's president, who was an experienced Government contractor and former Government employee. Mr. Natan testified that at that time appellant was seeking recovery of savings as acquisition savings, not as collateral savings, and that he thought that any offset of "negative acquisition savings" would be offset against the acquisition savings appellant was claiming. Appellant's primary concern was to have the units which had been manufactured using the VECP and had been completed since May 1987 accepted so that it could get paid. When he saw the language in Modifications A00003, it was unclear so he checked with his counsel who indicated that the provision had no effect and that Mr. Natan should ask that the language be crossed out. Mr. Natan was informed that the ACO would not agree to any change in the language. A memorandum for the record by Paul M. Hayes, Jr., dated 1 May 1987 corroborates the fact that the ACO would not change the language. It recites:

> During the past week numerous attempts have been made by me and Mr. Natan to permit the shipment of 3000 ea. plug sleeves from Job 344. DCASMA Reading (Mr. A. Vesloski [the contract administrator] & Mr. J. Thomas) informed me that a contract modification (bilateral agreement) incorporating the technical aspect of VECP 001 would be required before the government would accept the product.

> I informed Mr. Vesloski that SAYCO could agree to a bilateral modification provided the language of the modification did not arrogate [sic] SAYCO's rights under the VECP.
>
> The language proposed by the Government was reviewed by SAYCO counsel and found to be unacceptable. SAYCO recommended to the Government changes in the language. The Government (Mr. Vesloski) informed me that his ACO would not change the language. Mr. Vesloski informed me that he was referring the issue to SPCC with the recommendation that SPCC issue a unilateral change order incorporating the technical aspects of VECP 001. In this way SAYCO could ship the units while the change order was being resolved.

(R4(b), tab 4)

9. The contemporaneous correspondence indicates that SAYCO, having manufactured the items incorporating the VECP, was extremely anxious to have them accepted. The Government would not accept them without the contract modification. There was difficulty in obtaining the requisite cost information from appellant which was necessary to determine the amount to which appellant was entitled because of acceptance of the VECP. Finally, bilateral Modifications A00003 for Contracts 1565 and 1504 were prepared and executed without all the information which the contract administrator considered should be available and the collateral savings were deferred to later modifications.

10. Initially, appellant had submitted its cost analysis of the VECP showing acquisition savings by including the amount the Government would save in labor using the VECP. However, this submittal did not adequately reflect the increased costs of the units which resulted in the increased manufacturing costs of the contractor and the increased unit costs termed "negative acquisition savings." When, after execution of the Modification A00003 to each contract, Mr. Natan was informed that there were no acquisition savings, he transferred

some of the amounts originally claimed as acquisition savings to collateral savings. Prior to execution of those modifications appellant had calculated collateral savings as $240,000 and appellant was not too concerned about them since its share was minor, $48,000, compared with the quantity of items on hand which it wanted to deliver so it could receive payment. Thereafter, appellant submitted a revised cost analysis seeking recovery of collateral savings.

11. By letter dated 2 February 1988, appellant submitted its collateral savings analysis, seeking the following:

Savings from reduced maintenance of government owned equipment	$ 240,000.00
Savings on operational expenditure due to the increase in service life	3,332,347.20
Savings resulting from the reduction of government costs in maintaining the end unit in service	5,509,082.00
Savings resulting from reduced logistics costs of procurement, transportation, storage and inventory maintenance	109,003.62
Total	$9,190,432.82

20% x $9,190,432.92 = $1,838,086.56

(Exhs. 580-584) In that same document appellant indicated that it was unable to quantify the following, but felt that they could double the amount of collateral savings:

a. Material costs, such as solvents, containers, heat lamps or sources which are required to fabricate plugs were not included in the above.

b. Cost of systems checks required after plug replacement were not included in the above calculations.

c. Costs of support and technical personnel were not included in the above calculations.

d. Costs of ancillary equipment replacements, [*i.e.*, damage to transducers/hydrophones caused by water intrusion due to failed plugs] were not used in the above calculation.

12. By letter dated 29 February 1992, appellant quantified the above four items, as follows:

a. Material cost savings on 3126 plugs @ $26.84 =	$ 83,901.00
b. Savings on cost of system checks:	718,018.00
c. Savings on cost of technical and support personnel	3,590,092.00
d. Savings on cost of damage to transducers/hydrophones cause[d] by water intrusion	4,085,199.00
TOTAL SAVINGS	$8,477,210.00

(Exh. 667-670) These claimed collateral savings were in addition to the $9,190,432.82 set forth above.

13. Because of lack of data concerning savings because of the VECP and the escalating nature of appellant's claim, the contracting officer was confused and had problems quantifying the amount of collateral savings. On 7 June 1989 appellant filed a certified claim for $11,028,519 as its share of collateral savings from its VECP under Contract 1565 and 1504. On 16 August 1989 appellant appealed from failure of the contracting officer to issue a decision on its claim. Thereafter, on 6 May 1990 the contracting officer issued his decision concluding that the collateral savings from the VECP were $1,300,600 for a year.

14. Prior to issuing his decision, the contracting officer repeatedly reviewed the VE clause. When the contracting officer received appellant's first proposal of collateral savings, he

referred it to the appropriate technical branch and informed that branch of how the VE clause defines collateral savings. Because of his concern about the methodology to use in this instance, he consulted with the person in charge of the Department of Defense VE program and with the instructor of the VE course at Wright Patterson Air Force Base. He also consulted with individuals involved with the VE program for the Navy, Army and Air Force. His purpose was several fold. He attempted to determine whether there is still a value engineering change when there is a unit price increase. He also inquired whether there was any operating procedure, instruction or computer model which could be used. He was informed there was no guidance or computation instruction. While "upper management" at the buying agency understood the issue which the contracting officer was raising (whether there could be collateral savings when there was a unit price increase as a result of a VECP), they did not feel it was a matter of concern in this instance.

15. In making the actual computations in his decision, the contracting officer relied a great deal on the technical advice from the technical branch. It was not possible to obtain actual figures because there were not many units is operation which incorporated the change, there was no model to use and it was extremely difficult, if not impossible, to segregate the units with the VECP from those which were not manufactured using the VECP.

16. It was possible to determine the Navy typical year usage of plugs by determining one third of the three year cyclical data usage of the plugs. This quantity, 6,253, was the same quantity used by appellant in its claim of 2 February 1988. The contracting officer also accepted appellant's manufacturing savings of 5 hours per item and labor costs of $40.00 per hour. The 5 hour savings was because of labor standards established in a Government manual and the contracting officer used that figure rather than the 1/2 hour savings per unit which he was informed was the actual amount of time saved. He concluded it was more appropriate to use the time included in the standards manual. Extending these figures and

adding the $50,000 to which he concluded appellant was entitled from its original proposal, the contracting officer concluded that the collateral savings were:

6,253 x 5 x $40.00 = $1,250,600 + $50,000 = $1,300,600

(R4, tab 20)

17. After consultation with the electrical engineer in the technical branch who analyzed appellant's claims, the contracting officer concluded that there was no entitlement or basis for recovery for the other items for which appellant sought a share as collateral savings. He, therefore, calculated the collateral savings to which appellant was entitled under the VE clause (20 percent of one year's savings) to be $260,000. The $260,000 had to be divided between Contracts 1565 and 1504. He developed a percentage based on a ratio of the quantity purchased under each contract over the three year usage for the item. This calculated to:

Contract 1565	86.4% x $260,000 = $224,640.00
Contract 1504	13.6% x $260,000 = $ 35,360.00

18. The contracting officer believed that pursuant to Modification A00003, the negative acquisition savings would be offset against the contractor's twenty percent share of the collateral savings. Since the negative acquisition savings, $387,639 for Contract 1565 and $154,225 for Contract 1504, exceeded the contractor's twenty percent share of collateral savings for each contract, the contracting officer concluded that appellant's share of collateral savings after offset was $0.00 for each contract. (R4, tab 20)

19. Having carefully considered all of the facts present in the record, many of which we have set forth in detail, we find that the decision by the contracting officer as to the amount of collateral savings was not arbitrary or capricious. To the contrary, because of the unique situation which existed here, an increase rather than decrease in the unit price because of acceptance of the VECP, the contracting officer made a great effort to determine just how the matter should be handled.

DECISION

In our decision on the cross-motions for summary judgment we reached the following conclusions:

> The cross-motions for summary judgment are denied. The partial motions for summary judgment are granted to the extent set forth above that (1) the determination of the contracting officer is reviewable for the limited purpose of determining whether it was arbitrary or capricious with the burden on appellant to prove such was the case and also to prove any amounts over those recognized by the contracting officer if it sustains its burden on entitlement; (2) the firm-fixed price for purposes of the collateral savings paragraph of the Value Engineering clause is that price at the time the VECP is accepted and, therefore, does not include any increases or decreases in that price because of such acceptance or any amount attributable to the collateral savings; (3) the sharing period for collateral savings is one year; (4) that in calculating any offset of negative acquisition savings which are appropriate under the collateral savings clause and the contract, the offset is subtracted from estimated yearly savings before the 20 percent to which the contractor is entitled is calculated; and (5) appellant's share of collateral savings shall not exceed $249,360 for Contract 1565 or $100,180 for Contract 1504.

(92-1 BCA at 122,592) In that opinion, we concluded that whether the contracting officer had abused his discretion in determining the amount of collateral savings, what was intended by the "offset" language in Modification A00003 to each contract and whether the contracting officer had erred in concluding that the contractor should not share in certain collateral savings were material facts in dispute and were not appropriate for summary judgment. On reconsideration, we affirmed those conclusions. We reaffirm them here.

Appellant argues eight issues. Many of the issues were argued in its various motions to the Board. They were discussed at great length in our earlier opinions and we shall not discuss them in detail here.

Appellant's first argument is that the Board reviews the contracting officer's decision *de novo*. This argument was considered in our decisions on the cross-motions for summary judgment and on reconsideration. After detailed discussion, we followed the precedent established in *ICSD Corporation*, ASBCA No. 28028, 90-3 BCA ¶ 23,027; *aff'd* 934 F.2d 313 (Fed.Cir. 1991). We concluded that paragraph (g) of the VE clause providing for collateral savings which states that "...The Contracting Officer shall be the sole determiner of the amount of collateral savings, and that amount shall not be subject to the Disputes clause...." still permitted us to determine whether the decision was arbitrary or capricious so that there was an abuse of discretion by the contracting officer. We, further, concluded that the appellant has the burden of establishing whether such determination was arbitrary and capricious and, if so, the amounts which were arbitrary and capricious. In its briefs, appellant completely ignores *ICSD*, *supra*, and our earlier opinions on this matter. We reaffirm our conclusions reached in those opinions. (92-1 BCA at 122,588-90; 92-3 BCA at 125,260)

Many of appellant's arguments concern the amount to which appellant is entitled over and beyond the amount determined by the contracting officer. We have not made detailed findings of fact as to these various amounts because we reaffirm the conclusions reached in our previous opinions concerning the limitations on amounts recoverable for collateral savings under paragraph (g) of the VE clause in appellant's contracts. It provided:

> (g) *Collateral Savings*. If a VECP is accepted, the instant contract amount shall be increased . . . by 20 percent of the projected net reduction in collateral costs determined to be realized in a typical year of use after subtracting any Government costs not

> previously offset. However, the Contractor's share of collateral savings shall not exceed (i) the contract's firm fixed price, target price, target cost, or estimated costs at the time the VECP is accepted, or (ii) $100,000, whichever is greater.

In our earlier opinions we discussed in detail the limitations in recovery of collateral savings established by the language of the clause. We reiterate our conclusion reached in those opinions that the "firm fixed price" for purposes of that clause means the contract price before determination of collateral savings (92-1 BCA at 122,590; 92-3 BCA at 125,260).

Appellant argues that the contract price for limitation purposes of the collateral savings clause should be the price set forth in Modification A00003 for each contract after increasing the unit price of the items. We do not agree. If that were to be the proper interpretation of the clause, in most instances the unit price is decreased, not increased, a result which would lead to a lower contract price and less recovery in many cases. We consider such a conclusion incorrect and that the phrase "at the time the VECP is accepted" means the contract price without considering any adjustment due to the value engineering change itself.

This leaves for consideration the question of just what was intended by Modification A00003 to each of the contracts here in question insofar as the offset provision is concerned. Appellant argues that evidence of what was meant by those provisions is barred by the parol evidence rule. We considered that matter in our opinion on appellant's motion for reconsideration. We concluded:

> (4) *Offset for "negative acquisition savings"*
>
> Appellant argues that consideration by the Board of evidence of negotiations which resulted in Modification A0003 [sic] to each of the contracts involved in this appeal would violate the parol evidence rule and that the agreement is clear on its face. In this instance the parties by negotiation

> agreed that negative acquisition savings would be offset in accordance with a specified FAR provision. There is nothing which prohibits the parties from resolving a matter by negotiation and, unless it specifically constitutes a deviation from a regulation for which a waiver would be required, it could constitute a valid agreement. We addressed this in our opinion on the motions [92-1 BCA at 122,591]. We do not agree with appellant that the regulations necessarily preclude such an offset if the parties, by negotiation, agree that such will be the case. Were we to decide this issue on the record before us, as argued by appellant, we would conclude that such offset should be made in the manner spelled out in these modifications. However, we were willing to allow appellant an opportunity to develop factually that this was not the situation. If it does not wish to avail itself of same and wishes to rest on the modifications, we would conclude that, in addition to any items of offset established pursuant to the collateral savings provision, the parties agreed that negative acquisition savings would be offset against collateral savings....

(92-3 BCA at 125,260) We reiterate the conclusions set forth in our prior opinions.

At the hearing the testimony of the contracting officer and contract administrator was straightforward that the question of offset of negative acquisition savings was a matter discussed with appellant on several occasions while the increase in unit price under these contracts was being negotiated and that Mr. Natan was informed that the increased costs would be offset against any collateral savings resulting from the VECP. At the hearing appellant's then president, Mr. Natan, testified that the language was unclear. At that time, appellant was seeking recovery of savings as acquisition savings, not as collateral savings, and that any offset of "negative acquisition savings" would be offset against the acquisition savings appellant was claiming. Appellant's primary concern was to have the units

which had been manufactured using the VECP and had been completed since May 1987 accepted so that it could get paid. Mr. Natan checked with his counsel who indicated that the provision had no effect and that Mr. Natan should ask that the language be crossed out. Mr. Natan was informed that the ACO would not agree to any change in the language. It was not until later, when Mr. Natan was informed that there were no acquisition savings that he transferred some of the amounts originally claimed as acquisition savings to collateral savings.

We find the testimony of the Government contracting officer and the contract administrator more credible than that of appellant. While Mr. Natan might have felt the language was "unclear" he was an experienced Government contractor and former Government employee. Language is not put into a contract modification if it has no effect. We have considered appellant's arguments why Mr. Natan's testimony was more credible than that of the Government witnesses and find they have no merit. We also point to the contemporaneous memorandum for the record which indicated even in May 1987 the language of the modifications was under discussion and that the ACO would not agree to any change. Certainly, appellant should have been aware, therefore, that the Government considered it to have some meaning and, if unaware of what was meant, should have clarified the purpose for the language or assume the risk it did have some effect.

Essentially what was accomplished by the VECP was to reduce the labor by Government personnel and increase the labor manufacturing costs of the supplier. The record, both oral and written, shows a serious concern and effort on the part of the Government personnel to determine the amount of collateral savings under an unusual situation, an increase rather than decrease in the unit price, taking into consideration the increased cost to the Government. We do not view this as bias on the part of the Government employees but a recognition of their obligation to protect the Government fisc.

We, therefore, reiterate our conclusion that under the facts of this appeal the negative acquisition savings should be offset against the collateral savings.

The Government argues that it was the contracting officer's understanding that the negative acquisition savings be offset against appellant's share of the collateral savings. The record fails to support a finding that this was made clear to appellant. We, therefore, conclude that our interpretation, namely, that such amounts be set off against collateral savings before computation of the contractor's 20 percent share, is appropriate. We calculate it as follows:

$$\$1,300,600 - (\$387,639\ [\text{Cont. } 1565] + \$154,225\ [\text{Cont. } 1504]) = \$758,736$$

Twenty percent of this amount, $151,747.20, allocated between the two contracts is as follows:

Contract 1565 $151,747.20 x 86.4% = $131,109.58
Contract 1504 $151,747.20 x 13.6% = $ 20,637.61

Appellant introduced oral and written evidence and requested numerous findings concerning the $17,667,642.82 to which it claims it is entitled. Because of our conclusions that the contracting officer was not arbitrary or capricious in reaching his decision on collateral savings and that the negative acquisition savings be offset against the collateral savings, we have not cluttered this opinion with such findings.

The appeal is sustained in the amount of $131,109.58 for Contract 1565 and $20,637.61 for Contract 1504 plus interest. The record fails to disclose when appellant's claim of 7 June 1989 was received. We conclude that interest should be computed from the date the contracting officer received the 7 June 1989 claim.

Dated: 7 November 1994

/s/ Ruth C. Burg

RUTH C. BURG
Administrative Judge
Armed Services Board
of Contract Appeals

I *concur*

/s/ Alan M. Spector

ALAN M. SPECTOR
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I *concur*

/s/ Mark N. Stempler

MARK N. STEMPLER
Administrative Judge
Acting Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 39366, Appeal of Sayco Ltd., rendered in conformance with the Board's Charter.

Dated: 10 NOV 1994

/s/ Donald D. Mills

for EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
SAYCO LTD.	)	
	)	ASBCA No.
Under Contract Nos. N00104-84-C-1565	)	39366
N00104-84-C-1504	)	

APPEARANCE(S) FOR THE APPELLANT:

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APPEARANCE(S) FOR THE GOVERNMENT:

C. John Turnquist, Esq.
Navy Chief Trial Attorney
Brad L. Johnson, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE BURG ON CROSS MOTIONS FOR SUMMARY JUDGMENT

This appeal concerns the amount, if any, to which appellant is entitled for collateral savings to the Government from an approved Value Engineering Change Proposal. Appellant filed this appeal from failure of the contracting officer to issue a decision pursuant to the Contract Disputes Act (CDA), 41 U.S.C. § 605(c)(5). Thereafter the contracting officer issued a decision determining the amount to which appellant was entitled for collateral savings and concluding that, because of offsets resulting from increased contract costs to effect the change, the net amount to which appellant is entitled is zero. The parties have filed cross motions for summary judgment.

FINDINGS OF FACT

These contracts for parts kit connector plugs, N00104-84-C-1565 (Contract 1565) and N00104-84-C-1504 (Contract 1504), were awarded appellant on 15 August 1984 and 10

July 1984, respectively. Under date of 12 November 1985, appellant submitted a Value Engineering Change Proposal (VECP 001) for Contract 1565 concerning the items covered by both contracts involved in this appeal. By letter dated 6 October 1986, appellant submitted its estimated costs for implementation of VECP 001 in appellant's contracts of $17.76 per unit for SAYCO and $90.15 for the Navy and its estimate of yearly collateral savings to the Government for implementation of VECP 001 of $240,000.

Modification A00003 to Contract 1504 dated 28 October 1987 and Modification A00003 to Contract 1565 dated 9 November 1987 incorporated the VECP into each contract. These bilateral modifications provided (1) that Contract 1565 was the "instant contract" and Contract 1504 was the "concurrent contract", (2) that approval of VECP 001 resulted in "Negative Acquisition Savings" for Contract 1565 of $387,639 and for Contract 1504 of $154,225 (a total of $541,864), (3) that the definitized negative acquisition savings would be offset in accordance with FAR 52.248-1, para (J) [sic], (4) that collateral savings would be calculated and determined by the procuring contracting officer (PCO) and incorporated by contract modifications at a later date, and (5) that the contract price for Contract 1565 became $636,999 and for Contract 1504 became $254,405.

Applicable portions of the Value Engineering clause, DAR 7-104.44 (Oct 1982), incorporated into the contracts by reference, provide:

> VALUE ENGINEERING (1982 OCT)
>
> (b) *Definitions.*
>
> (1) "Acquisition savings" means savings resulting from the application of VECPs to contracts awarded by the same contracting office or its successor for essentially the same unit. Acquisition savings include:
>
> (i) instant contract savings...;

(ii) concurrent contract savings...;

(iii) future contract savings....

(2) "Collateral costs" means agency costs of operation, maintenance, logistic support, or Government-furnished property.

(3) "Collateral savings" means those measurable net reductions resulting from the VECP in the agency's overall projected collateral costs, exclusive of acquisition savings, whether or not the acquisition cost changes.

* * *

(7) "Negative instant contract savings" means that the acceptance of the VECP results in:

* * *

(ii) an excess of contractor's development and implementation costs as compared to the unit cost reduction multiplied by the number of units affected; and

(iii) a consequent equitable adjustment increasing the instant contract price.

These savings are not a Government cost.

(8) "Net acquisition savings" means acquisition savings less Government costs.

(9) "Sharing period" means that period that extends to the 3 years after acceptance of the first item incorporating the VECP, or the delivery schedule in effect for all affected end items on the instant contract when the VECP is accepted, whichever is longer.

* * *

(f) *Sharing.*

* * *

(3) Contract Adjustment and Payment. The modification accepting the VECP shall:

* * *

(iii) specify the amount of any Government costs or negative instant contract savings to be offset against net acquisition savings realized from concurrent or future contract savings; and

(iv) provide the Contractor's share of any net acquisition savings under the instant contract in accordance with the following:

(A) Fixed-price contracts--add to contract price

* * *

(g) *Collateral Savings*. If a VECP is accepted, the instant contract amount shall be increased, as specified in (f)(3)(iv), by 20 percent of the projected net reduction in collateral costs determined to be realized in a typical year of use after subtracting any Government costs not previously offset. However, the Contractor's share of collateral savings shall not exceed (i) the contract's firm fixed price, target price, target cost, or estimated costs at the time the VECP is accepted, or (ii) $100,000, whichever is greater. The Contracting Officer shall be the sole determiner of the amount of collateral savings, and that amount shall not be subject to the Disputes clause.

Modification A00003 for Contract 1565 provided the following:

WHEREAS: The PCO partially approved the Technical Aspects of the Contractor's VECP-001, via. NSPCC, Letter, 4400

SER 02511.1/TJF/1 10 Oct 86 and approved all technical aspects of VECP-001, via NSPCC, Letter, 4330, SER 02511/TJF/56, 12 Feb 86, and;

WHEREAS: The PCO has designated this contract as the instant contract and Contract N00104-84-C-1504 as the concurrent contract and has delegated authority to the ACO DCASMA Reading, to negotiate and finalize the VECP-001, via NSPCC Letter, 4330 SER. 02511/TJF/4 dated 14 Nov 86 and;

WHEREAS: Negotiation of the Contractor's Cost/ Price proposal dated 19 Jun 87 was accomplished and completed on 13 Oct 87 through attainment of mutual agreement of the parties.

NOW THEREFORE: The contractor's VECP-001, dated 12 Nov 85 is attached hereto and hereby made to be part of the contract and is definitized as follows:

1. *ACQUISITION SAVINGS*: The approval of VECP-001, 12 Nov 85, has resulted in "Negative" Acquisition Savings. Specifically, the VECP-001 results in a unit and total contract price increase on this, the instant contract; the aforementioned concurrent contract and on future contracts for the procurement of the applicable NSN(s). Accordingly, negative acquisition savings in the amount established below, will be offset in accordance with FAR 52.248-1, para (J) [sic]

NEGATIVE ACQUISITION SAVINGS -
$379,728.00 Recurring
7,911.00 Non-recurring
Total $387,639.00

2. *COLLATERAL SAVINGS*: Collateral savings will be calculated and determined by the NSPCC, PCO. The amount to be shared with and paid to the contractor shall be approved and incorporated into the contract at a later time via contract modification to be issued by the NSPCC, PCO.

* * *

The modification recited that the contract price, after certain prior modifications, at the time of negotiation of VECP 001 was $249,360.

Modification A00003 to Contract 1504 was similar to the one set forth above. It recited that the Negative Acquisition Savings for Contract 1504 were $151,240 for recurring and $2,985 for non-recurring costs, a total of $154,225, and that the contract price at the time of negotiation of the VECP was established to be $100,180.

While the modifications referred to the FAR Value Engineering clause, 52.248-1, paragraph (j), that clause was almost identical to the DAR 7-104.44, paragraph (g) set forth above. The only difference was that instead of a reference to (f)(3)(iv), the reference was to (h)(5). The text of paragraph (h)(5) in the FAR clause was substantially identical to paragraph (f)(3)(iv) in the DAR clause set forth above.

By submittal dated 2 February 1988 to the contracting officer, appellant noted that it still had not been notified of the amount to which it was entitled for collateral savings and submitted its analysis of collateral savings for a typical year to be $9,190,432.82 resulting in its 20 percent share as $1,838,086.56. It also indicated that this amount did not include material costs, costs of systems checks, costs of support and technical personnel and costs of ancillary equipment

replacements since it had no means of estimating same, but estimated that such costs would double its estimated figure.

By letter dated 8 December 1988 to SAYCO, the Commander, Naval Sea Systems Command stated:

> 1. Reference (a) requested Naval Sea Systems Command (NAVSEA) to confirm SAYCO's conclusion on the relative life expectancy of MIL-C-24231 pressure proof plugs.
>
> 2. It is understood by NAVSEA that the Value Engineering Change Proposal (VECP) submitted by SAYCO Ltd. would:
>
> a) Provide each kit with the contacts molded into a prepot.
>
> b) Supply the monel plug sleeves without the four fill holes.
>
> c) Furnish the plug sleeves sandbasted [sic] and primed.
>
> 3. Pressure proof connector plugs with an epoxy back fill of the monel plug shell is a practice used by the U.S. Navy to enhance the life of the connector plug. This method of supplying the plug kits will intensify the reliability and subsequently prolong the life of the connector plug. Data from trial installations yields a life expectancy of at least twice that of connector plugs fabricated without using this method.
>
> 4. NAVSEA concurs that plug kits submitted within the guidelines stated above will result in a considerable installation time savings for the user activities and provide a more reliable end product.
>
> 5. The contents of this correspondence do not in any way change the terms of any understanding, agreement, solicitation or contract existing with the government and will not be effective or binding upon

> the government unless formalized by an appropriate contractual document executed by the cognizant Procuring or Administrative Contracts Officer (PCO/ACO).

Appellant submitted a certified claim dated 7 June 1989 in the amount of $11,028,519. In calculating this amount, it doubled the computation it had submitted dated 2 February 1988 in line with its statement in the prior submittal that it felt such doubling appropriate because of the costs for which it had no basis to estimate. It calculated its share of total yearly savings as $3,676,173, and multiplied this times three years as SAYCO's sharing period, to reach the total amount of its claim.

When appellant failed to receive any action on its claim, it filed this appeal which was docketed by the Board on 16 August 1989. In its answer to appellant's complaint, the Government challenged the jurisdiction of the Board on the basis that the contract provided, in paragraph (g) of the Value Engineering clause, *supra,* that the contracting officer would be the sole determiner of collateral savings and that this determination would not be subject to the Disputes clause of the contract. No Motion to Dismiss was filed. On 3 January 1990 appellant filed a "Motion for Summary Judgment as to Entitlement" to which the Government filed its objection on the grounds that appellant had failed to establish (1) that there were no genuine issues of material fact or (2) that it was entitled to judgment as a matter of law. Ruling on the motion was deferred by the Board until discovery could determine whether any material facts were in dispute in this appeal.

On 8 May 1990 the contracting officer issued a decision in which he concluded that appellant's 20 percent share in collateral savings in Contract 1565 were $224,640, which after offset against the "negative acquisition savings" of $387,639, resulted in appellant's share due under Contract 1565 to be zero. The contracting officer further concluded that appellant's share in collateral savings in Contract 1504 was $35,360 which after offset against the "negative acquisition

savings" of $154,225 also resulted in a zero amount being due to appellant for collateral savings. This decision of the contracting officer, entitled a final decision and including the standard language on right of appeal, was filed with the Board as Rule 4 tab 20.

Appellant objected to inclusion of the contracting officer's decision as Rule 4 tab 20 on the grounds that:

> ...1) as of the time the contracting officer issued said document he no longer had jurisdiction to render a final decision, it being egregiously untimely and such jurisdiction having been removed by appellant's long since appeal herein on August 14, 1989; 2) said document being no more than a self-serving instrument, suitable only as a memorandum or other form of argumentation; 3) said document being inadmissible as part of any evidentiary record because it is replete with hearsay materials and if, to any extent, it is supposedly based upon the contracting officer's personal knowledge it is unsworn and not amenable to confrontation and cross-examination.

By Order of the Board dated 30 May 1990, the document was removed from the Rule 4 file, as follows:

> Rule 4(e) requires removal from the Rule 4 file of any document(s) objected to by a party. In accordance with Board Rule 4(e), the referenced documents have been constructively removed from the Rule 4 file. No evidentiary ruling will be made on these documents at this time. The Government retains the right to offer the documents in accordance with Board Rule 13 and 20.

The parties continued voluntary discovery. On 20 November 1990 the Government filed a Motion for Summary Judgment on the bases that no genuine issues of material fact exist and that it is entitled to judgment in its favor as a matter of law. In the alternative, the Government moved for partial summary judgment on the issue of the maximum amount of

collateral savings recoverable by appellant in this matter. Appellant filed its opposition to the Government's Motion for Summary Judgment and its cross Motion for Summary Judgment. It agrees with the Government that there are no material facts in dispute and that the matter is ripe for summary judgment. In the alternative, it also moves for partial summary judgment and that the Board should specify those issues of material fact it concludes must go to a hearing so that a hearing can be focused and shortened.

DECISION

The issues which the parties have addressed in the cross motions for summary judgment and which we must decide are discussed below.

(1) Did the contracting officer's failure to issue a decision within the time limits established by the Contract Disputes Act on appellant's claim of the amount of collateral savings resulting from its accepted VECP and appellant's appeal from such failure and docketing of such appeal by the Board, deny the contracting officer of the authority to issue such a determination? Since the contracting officer has now issued a determination does the Board have jurisdiction to review such determination, and, if so, what is the extent of such review?

Appellant argues that the failure of the contracting officer to issue a determination concerning collateral savings prior to docketing of this appeal deprives the contracting officer of the jurisdiction to make such a determination. We do not agree. The contracting officer retains his or her authority and responsibilities under a contract at least until such contract is completed and closed. Thus, a contracting officer can and does settle a dispute even while it is pending before this Board or some other forum, or withdraws or modifies a decision during pendency of an appeal. Such authority is not limited to instances where a decision is issued prior to an appeal. Section 6(c)(4) of the Contract Disputes Act specifically gives the Board authority to order a contracting officer to issue a decision should a contractor so request. While an appeal to the Board is *de novo*, on occasion this Board has ordered a

contracting officer to issue a decision so that the Government's position is clarified even after an appeal is taken, pursuant to Section 6(c)(5) of the Act which provides:

> (5) Any failure by the contracting officer to issue a decision on a contract claim within the period required will be deemed to be a decision by the contracting officer denying the claim and will authorize the commencement of the appeal or suit on the claim as otherwise provided in this Act. *However, in the event an appeal or suit is so commenced in the absence of a prior decision by the contracting officer, the tribunal concerned may, at its, option, stay the proceedings to obtain a decision on the claim by the contracting officer.* [Emphasis added]

The fact that the decision was issued without a stay does not, in our opinion, make it any less appropriate. To the contrary, it expedites the processing of the appeal. Nor has appellant understood the purpose of our removing the decision from the Rule 4 file. As our Order clearly stated, this did not constitute a ruling on its admissability as evidence. It merely conformed to the requirements of Board Rule 4(e) which provides:

> (e) *Status of Documents in Appeal File* - Documents contained in the appeal file are considered, without further action by the parties, as part of the record upon which the Board will render its decision. However, a party may object, for reasons stated, to consideration of a particular document or documents reasonably in advance of hearing or, if there is no hearing, of settling the record. If such objection is made the Board shall remove the document or documents from the appeal file and permit the party offering the document to move its admission as evidence in accordance with Rules 13 [Settling of the Record] and 20 [Hearing].

Both parties argue that the Board should reconsider its decision in *ICSD Corporation*, ASBCA No. 28028, 90-3 BCA ¶ 23,027; *affd* (after motions in this appeal filed) 934 F2d 313

(Fed.Cir.1991). The Government argues that paragraph (g) of the Value Engineering clause providing for collateral savings which provides that "...The Contracting Officer shall be the sole determiner of the amount of collateral savings, and that amount shall not be subject to the Disputes clause...." deprives any forum from reviewing that determination. Appellant argues that review of any determination of collateral savings should be *de novo* and not a limited review.

In *ICSD Corporation, supra*, we carefully considered the Government's arguments that it could "reserve unto itself the prerogative to make a unilateral finding on the amount of a collateral savings award, and to keep that determination beyond the pale of any review." We concluded "that appellant's claim seeking review of the contracting officer's decision regarding the amount of collateral savings to which appellant is entitled, is subject to limited review by this Board under the CDA" to determine whether it was arbitrary or capricious so that there was an abuse of discretion by the contracting officer. That opinion carefully considered the positions argued in this appeal and we see no need to reiterate them here. Only ICSD filed an appeal. The Government did not appeal our conclusion that we had limited jurisdiction to review despite the language in paragraph (g). While the Federal Circuit did not directly address this question in affirming our decision, it did agree that the appellant has the burden of proving abuse of discretion and considered the issues as to amount which appellant had appealed. We, therefore, conclude that it found no error in our interpretation of limited reviewability of the collateral savings determination. Having also considered appellant's arguments that our review should not be limited as set forth in *ICSD Corporation, supra,* we conclude that our holding as set forth in that appeal is the correct one and that the contracting officer's decision regarding the amount of collateral savings to which appellant is entitled is subject to our determining whether such decision was arbitrary or capricious so that there was an abuse of discretion by the contracting officer.

Appellant has the burden of establishing that there was an abuse of discretion in this instance. It also has the burden of establishing the amount attributable as to those determinations which are found to be arbitrary or capricious and, thus, an abuse of discretion. In this regard, we note that in its claim appellant merely doubled its calculated amount because of the difficulty of determining or estimating the precise amount due for various categories of savings. While we recognize that the contract in the present appeal contained a later version of the Value Engineering clause than was in the contract considered in *ICSD Corporation, supra,* here, the clause defines "collateral savings" in paragraph (b)(3) as "those *measurable* net reductions" resulting from the VECP in the agency's collateral costs. As was affirmed by the Federal Circuit, 934 F2d at 317, appellant must still establish the amount attributable to these reduced costs.

Since the question of whether the contracting officer abused his discretion in determining the amount to which appellant is entitled for collateral savings is a material question of fact upon which the parties do not agree, neither motion for summary judgment is appropriate in this appeal. Having so concluded, we must consider the issues presented by the parties in their motions for partial summary judgment.

(2) Does the "firm fixed price...at the time the VECP is accepted" as used in the Value Engineering clause paragraph (g), the collateral savings provision, include an amount attributable to the anticipated collateral savings or is it limited to the fixed price before determination of collateral savings?

Paragraph (g) of the Value Engineering clause provides that "the Contractor's share of collateral savings shall not exceed (i) the contract's firm fixed price...at the time the VECP is accepted, or (ii) $100,000, whichever is greater." Appellant argues that in determining the limitation of the amount of collateral savings to which it is entitled, the contract price must be increased by the amount of collateral savings which are determined to be due under the contract. The Government

argues that the contract price is that which exists without the addition of the collateral savings.

We find appellant's interpretation unreasonable. The clause says "at the time the VECP is accepted" not "after the VECP is accepted". In addition, to interpret the provision as argued by appellant would effectively read limitation (i) in the collateral savings paragraph (g) out of the Value Engineering clause. If one adds the anticipated collateral savings to the existing contract price, the total will always be greater than the collateral savings since, using appellant's approach, that figure is one of the amounts making up the total. We conclude that for purposes of paragraph (g) the contract price does not include any collateral savings.

(3) Is the sharing period for collateral savings one year or three years?

Appellant argues that at best the Value Engineering clause is ambiguous, that its interpretation is reasonable, and that under the doctrine of *contra proferentem* its interpretation that it is entitled to share in three years of collateral savings should prevail. Appellant is certainly correct that when there are two reasonable interpretations to a contract there is an ambiguity which generally will be interpreted against the drafter. However, we do not find that to be the case in the present appeal. Appellant argues that since, in the definition section, "sharing period" is defined to mean three years that this definition pertains to collateral savings sharing. The definition section of the clause attempts to define terms which are used within the clause so that the clause can be properly interpreted. The words "sharing period" do not appear in paragraph (g) of the clause concerning collateral savings. To the contrary, the clause is quite specific that "the instant contract amount shall be increased, as specified in (f)(3)(iv), by 20 percent of the projected net reduction in collateral costs determined *to be realized in a typical year of use*." [Emphasis added] While we concur with appellant's argument that a contract must be read as a whole, reading it as such would not result in the position advocated by appellant. We recognize that paragraph

(f)(3)(iv) delineates the manner in which the contract modification should provide for net acquisition savings. However, we interpret paragraph (g) as referencing the entire subparagraph (f) and, more specifically, the provision which indicates the administrative manner in which the contract shall provide for any increase recognized because of collateral savings, namely (f)(3)(iv)(A). That portion is subsequent to the language relied on by appellant, and indicates that any collateral savings shall be reflected in a contract modification which, in the case of a fixed-price contract, should be added to the contract price.

Therefore, reading the contract as a whole, we conclude that recognition of collateral savings, unless precluded by some other contract provision, will be reflected in a contract modification increasing the contract price by 20 percent of the projected net collateral savings determined to be realized in one typical year of use, not the three years requested by appellant.

(4) Should "negative acquisition savings" on the instant and concurrent contracts be offset against collateral savings under those contracts?

The Government offset the "negative acquisition savings" resulting from the implementation of the value engineering change in appellant's instant contract and concurrent contract, the contracts involved in this appeal, against appellant's 20 percent share of the collateral savings it calculated it would enjoy. The contract modification incorporating the change into each of these contracts provided that the negative acquisition savings would be offset in accordance with FAR 52.248-1(J) [sic]. That clause is not the one incorporated into the contracts by reference. We assume that the referenced clause would be paragraph (j) of the 1984 version of the Value Engineering clause. The text of the 1984 collateral savings clause was almost identical to the DAR 1982 clause set forth in our findings. Under either the FAR or DAR clause, offset against collateral savings is limited to Government costs. Neither clause defines "negative acquisition

savings." The definition section of both of those clauses specifically excludes negative instant contract savings as a Government cost. (DAR 7-104.44(b)(7) or FAR 52.248-l(b) "Government costs").

Modification A00003 to each of the contracts involved in this appeal recites that:

> Negotiation of the Contractor's Cost/Price proposal dated 19 Jun 1987 was accomplished and completed on 13 Oct 87 through attainment of mutual agreement of the parties.

The record in this appeal is devoid of any evidence concerning such negotiations. We consider these facts material in determining whether there was a meeting of the minds by the parties concerning how the negative acquisition savings were to be offset. In addition, "negative acquisition savings" for Contract 1565, would appear to equate to "negative instant contract savings" which are excluded from the definition of "Government cost" in the definition section of both the 1982 and 1984 Value Engineering clauses. The record contains nothing to indicate that a deviation from the clause was requested if, in fact, such agreement would constitute a deviation for which a waiver would be necessary. In our view, the facts concerning the negotiations which resulted in Modification A00003 to both Contracts 1565 and 1504 are material facts which are necessary for deciding this issue. This question, therefore, is not appropriate for a summary judgment determination under the present state of the record.

We do conclude that the manner in which the Government offset the negative acquisition savings is in error. The collateral savings paragraph in both the 1982 and 1984 clauses, provides that the contractor is entitled to 20 percent *after* offset. The only reasonable interpretation is that the offset must occur prior to computation of the contractor's share. The contracting officer offset 100 percent of the negative acquisition savings against 20 percent of the calculated collateral savings. In our view, this was in error and should be corrected for any negotiations which the parties hold to resolve the amount due

appellant for collateral savings. As previously discussed, the contractor's share of collateral savings is limited to the contract price at the time the VECP was accepted or $100,000, whichever is greater. Thus, appellant would be limited to recover no more than $249,360 under Contract 1565 and $100,180 under Contract 1504.

(5) Additional Issues

In addition to the issues addressed above, appellant argues that the Government erred in its conclusion that appellant should not share in certain collateral savings because the Navy had already included a recommendation for a procedure similar to that accepted here in its technical manual in August 1985 and because the release of certain equipment from Navy use would result in no collateral savings since the equipment had to be used for other tasks. We consider that these constitute material facts in dispute since they go to the question of whether the contracting officer's determination of collateral savings was arbitrary or capricious and that they are not appropriate for summary judgment.

Conclusion

The cross motions for summary judgment are denied. The partial motions for summary judgment are granted to the extent set forth above that (1) the determination of the contracting officer is reviewable for the limited purpose of determining whether it was arbitrary or capricious with the burden on appellant to prove such was the case and also to prove any amounts over those recognized by the contracting officer if it sustains its burden on entitlement; (2) the firm-fixed price for purposes of the collateral savings paragraph of the Value Engineering clause is that price at the time the VECP is accepted and, therefore, does not include any increases or decreases in that price because of such acceptance or any amount attributable to the collateral savings; (3) the sharing period for collateral savings is one year; (4) that in calculating any offset of negative acquisition savings which are appropriate under the collateral savings clause and the contract, the offset is subtracted from estimated yearly

savings before the 20 percent to which the contractor is entitled is calculated; and (5) appellant's share of collateral savings shall not exceed $249,360 for Contract 1565 or $100,180 for Contract 1504.

The parties shall establish a schedule for further proceedings and submit it to the Board within 30 days of receipt of this opinion and indicate the matters which, based upon this opinion, still require stipulations or an oral hearing. The schedule shall provide for serious settlement negotiations based on the partial summary judgment conclusions set forth in this opinion and shall establish a time for a telephone prehearing conference to discuss further scheduling in this appeal which time will be after the parties have discussed settlement of this appeal. In this regard, the Board notes that a number of additional motions have been filed which have not been addressed in this decision because they have either been withdrawn or have become moot. The parties are urged to discuss further scheduling on a voluntary basis and avoid the time and expense of formal motions addressing various matters.

Dated: 8 November 1991

/s/ Ruth C. Burg

RUTH C. BURG
Administrative Judge
Member of the Armed
Services Board of Contract
Appeals

I *concur*

/s/ Alan M. Spector

ALAN M. SPECTOR
Administrative Judge
Acting Chairman, Armed
Services Board of Contract
Appeals

I *concur*

/s/ William J. Rubbery

WILLIAM J. RUBBERY
Administrative Judge
Vice Chairman, Armed
Services Board of Contract
Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 39366, Appeal of SAYCO LTD., rendered in conformance with the Board's Charter.

Dated: 8 NOV 1991

/s/ Edward S. Adamkewicz

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals

United States Court of Appeals for the Federal Circuit

O R D E R

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on May 28, 1996 unless another time becomes appropriate under Rule 41.

FOR THE COURT,
FRANCIS X. GINDHART, CLERK

Dated: May 8, 1996

By /s/ BLD
Brian P. LeDuc
Associate Chief Deputy

Clerk

cc: GILBERT H. WEIL
DOMENIQUE KIRCHNER

SAYCO LTD V NAVY, 95-1226
(BCA - 39366)

FILED
U.S. COURT OF
APPEALS FOR THE
FEDERAL CIRCUIT

MAY 08 1996

FRANCIS X.
GINDHART
CLERK

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

Final Decision of Thomas J. Fura, Contracting Officer, pages 13-19, dated May 8, 1990.

Computation of Collateral Savings
Contracting Officer's Determination and Findings.

The Value Engineering Clause is clear with respect to computation of collateral savings. Paragraph (g) of the Value Engineering Clause states in full: "If a VECP is accepted, the instant contract amount shall be increased, as specified in (f) (3) (iv), by 20 percent of the projected net reduction in collateral costs determined to be realized in a typical year of use after subtracting any Government costs not previously offset. However, the contractor's share of collateral savings shall not exceed (i) the contract's firm fixed price, target price, target cost, or estimated cost at the time the VECP is accepted, or (ii) $100,000, whichever is greater. The Contracting Officer shall be the sole determiner of the amount of collateral savings, and that amount shall not be subject to the Disputes clause. In all cases, degradation of performance, service life or capability shall be considered in determining savings."

The Contractor's letter dated 2 February 1988 (attachment 9 of the claim) (R4 tab 19) was reviewed with respect to computation of collateral savings utilizing procedures stipulated by DAR 1-1704 and the Value Engineering Clause of the contract.

The majority of the collateral savings claimed in the contractor's analysis is based on an increase in the service life of the connector by a factor of two (2), thereby reducing maintenance of Government owned equipment, expenditure of Government material and labor, Government costs in maintaining the end unit in service, and logistics costs of procurement, transportation, storage and inventory maintenance.

The increase in service life is directly related to the requirement to provide an epoxy waterblock in the molded connector. NAVSEA incorporated this requirement in the approved procedures via a tech manual change in August 1985. This date precedes the original VECP submittal by three (3)

months. This requirement was implemented prior to the VECP submittal. Therefore the Contracting Officer determines that no entitlement exists to share in collateral savings under the contracts for this element which was implemented as a tech manual change before the VECP submittal.

With respect to the elimination of Government equipment alleged in the contractor's letter the following findings are rendered:

1. Elimination of all maintenance and support costs associated with the operation of Grit-blasting machinery: The Contracting Officer finds that this item will be used in other operations and determines that no collateral savings entitlement exists.

2. Eliminates the requirement to maintain local or national stock numbers for #50 angular steel grit. Eliminates all costs of purchase, storage and transportation of same to using activities: The Contracting Officer finds that this item will be used in other operations and determines that no collateral savings entitlement exists.

3. Eliminates the requirement to maintain local or national stock numbers for metal primers. Eliminates all costs of purchase, storage and transportation of same to the using activities: The Contracting Officer finds that these items will be used in other operations and determines that no collateral savings entitlement exists.

4. Eliminates need for alignment heads and pre-pot rings used in molds required to fabricate SYM713 plugs by the using activities. Cost of mold maintenance by using activities will be reduced by a factor of two due to a corresponding decrease in useage rate: The Contracting Officer determines that entitlement exists for sharing of collateral savings within this element and finds that $50,000.00 is a fair and reasonable sharing amount.

5. A 50 percent reduction of maintenance costs on ancillary equipment required to manufacture SYM713 type plugs will be achieved. The equipment used by the Government for this work include, but is not limited to, the following:

Vacuum Equipment

Freezers

Ovens

The Contracting Officer finds that any anticipated savings is due to the increase in service life which is in turn directly related to the requirement to provide an epoxy waterblock in the molded connector; said requirement was incorporated as a tech manual change prior to submittal of the VECP. Therefore, the Contracting Officer determines that no collateral savings entitlement exists.

With respect to the Contractor's allegation of savings on operational expenditures due to the increase in service life, the Contracting Officer finds that any increase in service life of the plugs due to the epoxy waterblock is not attributable to the Contractor's VECP and therefore determines that no entitlement exists for the contractor to share in any such savings, with respect to this element if so realized.

With respect to the Contractor's allegation of savings resulting from the reduction of Government costs in maintaining the end unit in service, the Contracting Officer finds that submarines do not normally drydock for the sole purpose of changing plugs and when plugs are replaced during drydock, no data is available measuring the cost of such effort. Furthermore, the contractor's allegation of savings is based on increased service life (due to the epoxy waterblock). Therefore, the Contracting Officer determines that no entitlement exists for the contractor to share in any such savings, within this element, since the requirement to provide an epoxy waterblock was incorporated as a tech manual change in August 1985, thereby preceeding the contractor's VECP by three months.

With respect to the Contractor's allegation of savings resulting from reduced logistics costs of procurement, transportation, storage and inventory maintenance, the Contracting Officer finds that this allegation of savings is based on increased service life (due to the epoxy waterblock). Therefore, the Contracting Officer determines that no entitlement exists for the contractor to share in any such savings within this element, since the requirement to provide an epoxy waterblock was incorporated as a tech manual change in August 1985, thereby preceeding the contractor's VECP by three months.

Additionally, the Contracting Officer finds that the contractor's VECP does, however, provide the plug kit in a manner which is more conducive to molding the plug with the epoxy as required in that it reduces the time required for fabrication. The Contracting Officer determines that entitlement exists for the Contractor to share in collateral savings with regard to this element.

In determining the Contractor's proper share of collateral savings pursuant to the Value Engineering Clause of the contracts, the Contracting Officer utilizes the following information which is considered to be the best information that is currently available:

1. A typical year's usage for Parts Kit connector, NSN 1H 5935-00-177-2220 QA and 1H 5935-00-177-2221 QA is established at 6253 units per year when employing the epoxy waterblock,

2. The Government will concede that time saved per plug is 5 hours.

3. Government hourly rate (used in Contractor's cost savings analysis dated 21 July 1986, R4 tab 5) is $40.00.

4. Savings resulting from reduced logistics costs is established at $31.87 per plug, and

5. The Contracting Officer does not take exception to the assertion that the epoxy waterblock will yield a doubling of the plug's service life.

Therefore, pursuant to the Value Engineering Clause, the Contractor's proper share of collateral savings is computed as follows:

6253 plugs for a typical year's usage

X 5 hours saved per plug

X $40.00 per hour Government labor rate

+ $50,000.00 eliminates need for alignment heads and pre-pot rings

= $1,300,600.00 subtotal

X 20% sharing rate mandated by paragraph (g) of the VECP Clause

= $260,000.00 collateral savings before offset agreed upon in contract Modification A00003

The parties agreed in bilateral contract modification A00003 (R4 tabs 1 & 2) of contracts "1565" and "1504" that "negative acquisition savings. . . will be offset in accordance with FAR 52.248-1 Paragraph J." The parties furthermore agreed that negative acquisition savings for contracts "1565" and "1504" were $387,639.00 and $154,225.00 respectively.

The 6253 plugs cited above are segregated as follows to arrive at a typical year's useage for each NSN:

Contract "1565"	
NSN 1H 5935-00-177-2221 QA	5401 yearly
Contract "1504"	
NSN 1H 5935-00-177-2220 QA	853 yearly

The 853 units applicable to contract "1504" constitute 13.6% of the 6253 units cited above. The firm fixed price of this contract (without reconsignment charges) is $99,800.00.

Pursuant to DAR 7-104.44 (g) the Contracting Officer establishes the collateral savings under this contract portion prior to offset at $35,360.00 and is not affected by the "cap" specified in paragraph (g) of the VECP clause. "Negative" acquisition savings offset against this figure is $154,225.00 resulting in a negative balance of $118,865.00. Since "negative" acquisition savings under this contract was not fully offset, the Contractor's proper share of collateral savings under this contract is $0.00.

The 5401 units applicable to contract "1565" constitute 86.4% of the 6253 units cited above. The firm fixed price of the contract (including the option excercised) is $250,260.00. Pursuant to DAR 7-104.44 (g) the Contracting Officer establishes the collateral savings portion (under this contract) prior to offset at $224,640.00. "Negative" acquisition savings offset against this figure is $387,639.00 resulting in a negative balance of $162,999.00. Since "negative" acquisition savings under this contract were not fully offset, the Contractor's proper share of collateral savings under this contract is $0.00.

This is the final decision of the Contracting Officer. You may appeal this decision to the Armed Services Board of Contract Appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the Board of Contract Appeals and provide a copy to the Contracting Officer from whose decision the appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number. Instead of appealing to the Board of Contract Appeals, you may bring an action directly in the U.S. Claims court (except as provided in the Contract Disputes Act of 1978, 41 U.S.C. 603, regarding Maritime Contracts) within 12 months of the date you receive this decision. If you appeal to the Board of Contract Appeals, you may, solely at your election, proceed under the Board's small claims procedure for claims of $10,000 or less or its accelerated procedure for claims of $50,000 or less.

Sincerely,

/s/ Thomas J. Fura

Thomas J. Fura

Contracting Officer

APPELLANT'S [SAYCO'S] POST-HEARING SUBMISSIONS, page 17 before the ASBCA [dated February 14, 1994]

ARGUMENT

POINT I

The Board Reviews the Contracting Officer's Decision de novo.

In proceedings under the CDA, "the facts, as well as the law, are decided *de novo* by the . . . court." *Seaboard Lumber Co. v. United States* [36 CCF ¶ 75,900], 903 F.2d 1560, 1562 (Fed.Cir. 1990) (citing 41 U.S.C. § 609(a)(3) (1982)), *cert. denied*, _U.S._, 111 S.Ct. 1308 (1991); *accord Lathan Co., Inc. v. United States* [36 CCF ¶ 75,842], 20 Cl.Ct. 122, 125 (1990) (citing *Assurance Co. v. United States* [33 CCF ¶ 75,181], 813 F.2d 1202, 1206 Fed.Cir. 1987)). "The court is not bound by either the findings of fact or the conclusions [of law] of the [contracting officer]. *Lathan Co. v. United States* [36 CCF ¶ 75,842], 20 Cl.Ct. 122, 125 (1990); *accord* 41 U.S.C. § 605(a). The administrative award of time or money under the *Changes* clause is not to be treated as if it were the unappealed determination of a lower court or a board of contract appeals that might be owed some sort of special deference on appeal. *Wilner v. United States* [38 CCF ¶ 76,517], 994 F.2d 783 (Fed.Cir. 1993).. . .

> *Mego Construction Company v. United States,* 39 CCF ¶ 76,564 at 88,309,_F.2d_(Fed.Cir. 1993).

To same effect as *Mego*, and authorities there cited: *Allen County Builders Supply*, 93-1 BCA ¶ 25,398 at 126,491 (ASBCA 1993).

BRIEF OF APPELLANT SAYCO LTD., pages 15-17

in the United States Court of Appeals for the Federal Circuit
[dated May 5, 1995]

ARGUMENT

Point I

The Board erred as a matter of law by refusing to review the contracting officer's decision de novo.

At pages 10-11 of its decision (A10-A11) the Board, relying upon its own imputation of meaning into *ICSD Corporation,* 90-3 BCA ¶ 23,027, *aff'd,* 934 F.2d 313 (Fed.Cir. 1991), held that it could review the contracting officer's decision only for abuse of discretion. This critically polluted its decisions on other issues involved here. E.g., "Because of our conclusions that the contracting officer was not arbitrary or capricious in reaching his decisions on collateral savings and that the negative acquisition savings be offset against the collateral savings, we have not cluttered this opinion with such findings." Decision, page 14 (A14).

The latest pertinent authority we have found is *Wilner v. The United States,* 24 F.3d 1397 (Fed.Cir. May 26, 1994) (en banc, Judges Bennett and Newman dissenting). That was more than five months before the Board's decision; and *Wilner* is definitive that the Board should instead have exercised de novo review.[1]

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[1] E.g.: "The plain language of the CDA and our decision in *Assurance* [*Co. v. United States,* 813 F.2d 1202 (Fed.Cir. 1987)] make it clear that when suit is brought following a contracting officer's decision, the findings of fact in that decision are not binding upon the parties and are not entitled to any deference." 24 F.3d at 1401. "De novo review precludes reliance upon the presumed correctness of the decision. *See Renegotiation Bd. v. Bannercraft Clothing Co.,* 415 U.S. 1, 23 [parallel citations omitted] (1974) (de novo proceeding is 'unfettered by any prejudice from the agency proceeding and free from any claim that the [prior] determination is supported by substantial evidence'). Thus, once an action is brought

(Footnote continued)

Having so overruled *Hedin, Wilner* must be deemed to have overruled the Board's attribution of the meaning of *ICSD* similarly and to the same extent.

We respectfully suggest that the Court need not incur the judicial and administrative waste of remanding to the Board for consideration of the contracting officer's decisions on a de novo basis, but should, under 41 U.S.C. § 609(c), remand with an appropriate order for final disposition of the case. As will be shown below, in passing, his determinations were erroneous wholly as a matter of law; they should, as a matter of law, have been set aside de novo by the Board, and can be now by this Court, without wasting further time, effort and expense.

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following a contracting officer's decision, the parties start in court or before the board with a clean slate." 24 F.3d at 1401-1402. And, "Accordingly, we today expressly overrule *Hedin* to the extent that it stands for the proposition that a contracting officer's decision constitutes a strong presumption or an evidentiary admission of the extent of the government's liability, albeit subject to rebuttal." 24 F.3d at 1402-1403.

To the same effect: "In proceedings under the CDA, 'the facts, as well as the law, are decided *de novo* by the . . . court.' *Seaboard Lumber Co. v. United States,* 903 F.2d 1560, 1562 (Fed.Cir. 1990) (citing 41 U.S.C. § 609(a)(3) (1982)), *cert. denied,* 499 U.S. 919, 111 S.Ct. 1308, 113 L.Ed.2d 243 (1991); *accord, Lathan Co., Inc. v. United States,* 20 Cl.Ct. 122, 125 (1990) (citing *Assurance Co. v. United States,* 813 F.2d 1202, 1206 (Fed.Cir. 1987)). 'The court is not bound by either the findings of fact or the conclusions [of law] of the [contracting officer]. *Lathan Co. v. United States,* 20 Cl.Ct. 122, 125 (1990); *accord,* 41 U.S.C. § 605(a). The administrative award of time or money under the *Changes* clause is not to be treated as if it were the unappealed determination of a lower court or a board of contract appeals that might be owed some sort of special deference on appeal.['] *Wilner v. United States* [38 CCF ¶ 76,517], 994 F.2d 783 (Fed.Cir. 1993).. . ." *Mega Construction Company v. United States,* 29 Fed.Cl. 396 at 414 (1993).